IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2008 Session

NINA MCKEY, ADMINISTRATRIX OF THE ESTATE OF RUBY IRENE BREWER, DECEASED v. NATIONAL HEALTHCARE CORP. ET AL.

Appeal from the Circuit Court for Lawrence County
No. CC-1972-06 Robert L. Holloway, Judge

No. M2007-02341-COA-R3-CV - Filed August 15, 2008

This appeal concerns the enforceability of an arbitration agreement included in a nursing home's admission documents. The trial court denied the defendants' motion to compel arbitration based upon its finding that the defendants had not proven that the family members who signed the arbitration agreement had authority to do so under the Tennessee Healthcare Decisions Act. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

John B. Curtis, Jr., and Bruce D. Gill, Chattanooga, Tennessee, for the appellants, National Healthcare Corporation et al.

Deborah Truby Riordan and Lisa E. Circeo, Lexington, Kentucky, for the appellee, Nina McKey.

OPINION

Nina McKey is the daughter and administratrix of the estate of Ruby Irene Brewer. Ms. Brewer was admitted to NHC Healthcare/Lawrenceburg on February 4, 2005. As part of the admission process, Pearlee Fletcher, daughter of Ms. Brewer, signed a Jury Trial Waiver and Dispute Resolution Procedure ("Arbitration Agreement") as her mother's "legal representative." Ms. McKey also signed this document on a line marked "Additional Signature." The Arbitration Agreement provided that all disputes and claims between the parties would be submitted to small claims court or binding arbitration and that both parties "hereby waive a jury trial for all disputes and claims between the parties . . . ." The Admission and Financial Agreement, also signed by Ms. Fletcher and Ms. McKey, stated that Dr. Khatri was Ms. Brewer's attending physician. Ms. Brewer was a resident of the NHC nursing home until December 17, 2005. She died on January 4, 2006.

On October 6, 2006, Ms. McKey filed this lawsuit as administratrix of Ms. Brewer's estate and on behalf of her wrongful death beneficiaries against National Healthcare Corporation d/b/a NHC Healthcare/Lawrenceburg; NHC/OP, L.P.; NHC Delaware, Inc.; and National Health Corporation (collectively "NHC"). The complaint alleged causes of action for negligence; gross negligence, willful, wanton, reckless, malicious, and/or intentional conduct; negligence under the Tennessee Medical Malpractice Act; violations of the Tennessee Adult Protection Act; and survival and wrongful death claims.

NHC filed a motion to compel arbitration and stay proceedings on July 21, 2007, seeking to enforce the Arbitration Agreement signed by Ms. Fletcher and Ms. McKey. The court made findings, including the following:

> Neither Pearlee Fletcher nor Nina McKey was the legal representative of Mrs. Brewer. Nothing in this record, at least as the Court has been able to determine, documents or identifies Pearlee Fletcher or Nina McKey as a surrogate for Ruby Irene Brewer. Such identification and documentation is required by Tenn. Code Ann. § 68-11-1806(c)(1) for someone to be the surrogate for a patient who lacks capacity.

Because NHC had not proven compliance with the Tennessee Healthcare Decisions Act to designate Ms. McKey or Ms. Fletcher as Ms. Brewer's health care surrogate, the trial court overruled NHC's motion to compel arbitration.

On August 15, 2007, NHC filed a motion for reconsideration and/or to alter or amend the court's order related to arbitration. In conjunction with the motion, NHC submitted additional documentation to support its claim that Ms. Fletcher and Ms. McKey had authority to act for Ms. Brewer under the Tennessee Healthcare Decisions Act. These documents included a Potential Patient's Signature Checklist completed by a nursing home representative based upon information provided by Ms. McKey.[1] The checklist indicates that Ms. Brewer had not been adjudicated incompetent by a court of law, had not had a guardian or "third party official" appointed to act on her behalf, and had not executed a power of attorney. The checklist further states that Ms. Brewer had no spouse or parent "who can sign this contract." The checklist then indicates that Ms. Brewer had "adult children who can sign this contract." The latter section gives the name of three children of Ms. Brewer. On September 28, 2007, the trial court denied NHC's motion to reconsider. NHC appealed pursuant to Tenn. Code Ann. § 29-5-319.

On appeal, NHC argues that the trial court erred in denying its motion to compel arbitration based upon insufficient compliance with the Tennessee Healthcare Decisions Act. In addition to

[1] Other documents submitted by NHC in conjunction with the motion to reconsider are an acknowledgment regarding patient rights and responsibilities signed by Ms. McKey on February 4, 2005, an acknowledgment regarding privacy practices notice signed by Ms. McKey on February 4, 2005, a sprinkler disclosure form signed by Ms. McKey on February 4, 2005, a patient care plan approval form signed by Ms. Brewer and Ms. McKey on February 15, 2005, a consent to treat form signed by Ms. McKey on February 11, 2005, an inventory of personal belongings signed by Ms. McKey on February 4, 2005, and an admission summary form dated May 12, 2005.

arguing that the trial court properly found that NHC failed to prove that Ms. McKey and Ms. Fletcher were authorized to act as surrogates under the Tennessee Healthcare Decisions Act, Ms. McKey asserts that Tenn. Code Ann. § 29-5-101 prohibits the enforcement of arbitration agreements against incompetents.

Analysis

This court reviews the denial of a motion to compel arbitration under the same standards applicable to bench trials. *Cabany v. Mayfield Rehab. & Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, *3 (Tenn. Ct. App. Jan. 9, 2007); *Spann v. Am. Express Travel Related Servs. Co., Inc.*, 224 S.W.3d 698, 706 (Tenn. Ct. App. 2006) (perm. app. denied Jan. 29, 2007). The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). If the trial judge did not make specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Reagan v. Kindred Healthcare Operating, Inc.*, No. M2006-02191-COA-R3-CV, 2007 WL 4523092, *8 (Tenn. Ct. App. Dec. 20, 2007); *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004). Our consideration of the preponderance of the evidence "is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice,* 983 S.W.2d 680, 682 (Tenn. Ct. App. 1999). Review of a question of law is also de novo, but "'with no presumption of correctness afforded to the conclusions of the court below.'" *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

In order to bind Ms. Brewer to the Arbitration Agreement, Ms. Fletcher and/or Ms. McKey had to have authority to act as her agent or surrogate. *See Thornton v. Allenbrooke Nursing & Rehab. Ctr., LLC*, No. W2007-00950-COA-R3-CV, 2008 WL 2687697, *5 (Tenn. Ct. App. July 3, 2008)*; Raiteri ex rel Cox. v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413, *9 (Tenn. Ct. App. Dec. 30, 2003). It is undisputed that neither daughter possessed a power of attorney or guardianship over her mother's affairs. NHC asserts that Ms. Fletcher and Ms. McKey had authority to act for their mother under the Tennessee Health Care Decisions Act, Tenn. Code Ann. § 68-11-1801, *et seq*.[2]

The Tennessee Health Care Decisions Act allows an adult or emancipated minor to designate a surrogate to make health care decisions for him or her. Tenn. Code Ann. § 68-11-1806(a). A person designated as a surrogate may make health care decisions on behalf of "an adult or emancipated minor, if, and only if: (1) The patient has been determined by the designated physician to lack capacity; and (2) No agent or guardian has been appointed or the agent or guardian is not

[2]Although Ms. McKey's brief includes arguments concerning the lack of actual or apparent authority of Ms. McKey and Ms. Fletcher to act on their mother's behalf, NHC relies strictly upon the Tennessee Healthcare Decisions Act for its argument that these signatories had authority to act for their mother. We need not, therefore, address other possible sources of authority since NHC has conceded these issues.

reasonably available." Tenn. Code Ann. §68-11-1806(b). The Act contains the following provision regarding patients who have not appointed or designated anyone to act on their behalf:

> In the case of a patient who lacks capacity, has not appointed an agent, has not designated a surrogate, and does not have a guardian, or whose agent, surrogate, or guardian is not reasonably available, **the patient's surrogate shall be identified by the supervising health care provider and documented in the current clinical record of the institution or institutions at which the patient is the receiving health care.**

Tenn. Code Ann. § 68-11-1806(c)(1) (emphasis added). Thus, with respect to a patient who, like Ms. Brewer, has not designated a health care surrogate, Tenn. Code Ann. § 68-11-1806(b) and (c) require that certain conditions be met in order to authorize a surrogate to act on behalf of the patient. These conditions include (1) a prior determination by the designated physician that the patient lacks capacity and (2) identification of the surrogate by the supervising health care provider with documentation in the current clinical record.

At oral argument, Ms. McKey conceded that Ms. Brewer was incompetent at the time of admission. NHC argues that this concession satisfies the statutory requirement of a finding of incapacity. We cannot agree. Under Tenn. Code Ann. § 68-11-1812, a person is presumed to have the capacity to make his or her own health care decisions. To overcome that presumption, the statute requires a determination by a physician that the patient lacks capacity. Tenn. Code Ann. §68-11-1806(b). The Tennessee Health Care Decision Act affects what our courts have described as a fundamental right: personal autonomy, which includes the ability to make one's own decisions about health care. *Cabany*, 2007 WL 3445550 at *5. We are unwilling to overlook the statutory requirements.

As to the prior determination of incapacity, there is nothing in the record to establish that Ms. Brewer's designated physician determined that she lacked capacity. A "designated physician" is defined as "a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes such responsibility." Tenn. Code Ann. § 68-11-1802(a)(4). In this case, the nursing home admission agreement named Dr. Khatri as Ms. Brewer's attending physician. As Ms. Brewer's attending physician, Dr. Khatri qualifies as "a physician who undertakes such responsibility [for Ms. Brewer's health care]." Therefore, in the absence of a previous designation by Ms. Brewer or her agent, Dr. Khatri is her designated physician under the statute. There is nothing in the record to suggest that Dr. Khatri was not "reasonably available." Tenn. Code Ann. § 68-11-1802(a)(4).[3]

[3] Tenn. Code Ann. § 68-11-1802(a)(15) defines "reasonably available" to mean "readily able to be contacted without undue effort and willing and able to act in a timely manner considering with the urgency of the resident's health care needs." Availability includes "availability by telephone." Tenn. Code Ann. § 68-11-1802(a)(15).

The statute further states that "the patient's surrogate shall be identified by the supervising health care provider and documented in the current clinical record of the institution or institutions at which the patient is then receiving health care." Tenn. Code Ann. § 68-11-1806(c)(1). "Supervising health care provider" is defined as "the designated physician or, if there is no designated physician or the designated physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care." Tenn. Code Ann. § 68-11-1802(17). "Health care provider" is defined as "a person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business in practicing of a profession."[4] Tenn. Code Ann. § 68-11-1802(9). NHC argues that the nursing home was the supervising health care provider because it was the health care provider that had assumed primary responsibility for Ms. Brewer's care. The language of the statute, however, specifically provides that the supervising health care provider shall be the designated physician if there is one and if he or is she is available. As discussed above, Dr. Khatri qualifies as Ms. Brewer's designated physician. In light of the statutory requirement that the designated physician identify the surrogate, NHC was obligated to obtain such identification from Dr. Khatri if he was reasonably available. There is no evidence in the record that Dr. Khatri was not reasonably available. Therefore, NHC failed to comply with Tenn. Code Ann. § 68-11-1806(c)(1).

The supervising health care provider's identification of a surrogate must be "documented in the current clinical record of the institution or institutions at which the patient is then receiving health care." Tenn. Code Ann. § 68-11-1806(c)(1). To establish the necessary documentation, NHC relies on documents submitted in conjunction with its motion to alter or amend. However, this argument is premised upon the assumption that NHC was the supervising health care provider. We have already determined that Ms. Brewer's designated physician, not NHC, was the supervising health care provider in this case. The forms in question do not contain any designation of a health care surrogate by Dr. Khatri or any physician and, therefore, cannot constitute a surrogate designation under the statute.[5]

In support of its argument that the nursing home complied with the statute in designating a surrogate, NHC cites two cases from other jurisdictions. We find those cases distinguishable from the instant action and unpersuasive. In *In re Ledet*, No. 04-04-00411-CV, 2004 WL 2945699 (Tex. Ct. App. Dec. 22, 2004), the patient's son signed her admission papers. In finding the arbitration agreement to be enforceable, the court noted that it was "undisputed that [the patient] was incapacitated at the time of her admission into the nursing home due to Alzheimer's disease." *Ledet*, 2004 WL 2945699 at *3. Based upon the son's testimony and the Texas statutes, the Texas court found that the patient's son had actual authority to sign the agreement. *Id.* at *4. The Texas laws at issue in *Ledet* differ significantly from Tennessee's statutes. Under Texas law, in the event that

[4] A "person" includes a corporation. Tenn. Code Ann. § 68-11-1802(11).

[5] Even if NHC could in some cases qualify as the supervising health care provider, an issue we need not decide in this case, the fact that the nursing home allowed Ms. McKey and/or Ms. Fletcher to sign other administrative and financial forms on behalf of their mother would not constitute documentation of its identification of a surrogate.

a patient was "comatose, incapacitated, or otherwise mentally or physically incapable of communication," a surrogate from a list, "in order of priority," who was willing and able to consent to treatment for the patient could do so.[6] *Id.* at *4. The Texas statute, unlike the Tennessee statute, did not require a physician to designate the surrogate. To the extent that *Ledet* evidences a loose interpretation of the statutory requirements, we disagree with it.[7]

The other case upon which the defendants rely is *Covenant Health Rehab of Picayune v. Brown, L.P.*, 949 So.2d 732 (Miss. 2007). In a motion seeking to declare a nursing home admission contract unconscionable, the plaintiffs alleged that the patient was incapable of managing her affairs. *Brown*, 949 So.2d at 736. While there was no evidence introduced of a statement by the primary physician, the plaintiffs further stated in their motion that the patient's "admitting physician at the hospital found that she did not have the mental capacity to manage her affairs." *Id.* at 737. The court concluded: "Seeing that [the patient] was incapacitated by virtue of admission by her representatives and corroboration by her admitting physician, she was capable legally of having her decisions made by a surrogate." *Id.* The court therefore found that the patient was bound by the admissions agreement signed by her daughter. *Id. Brown* is distinguishable from the present case because there was a finding by a physician that the patient was mentally incapacitated.[8]

In a subsequent case, *Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, No. 2006-CA-00427-SCT, 2008 WL 95814, *4 (Miss. Jan. 10, 2008), the Mississippi Supreme Court found that the patient's cousin's wife qualified as a surrogate under Mississippi's Uniform Health Care Decisions Act.[9] Although there was no declaration by the patient's primary physician that she was incapable of managing her affairs, "the fact that [the patient] had the mental capacity of a three-year-old and could not reside alone and care for herself [was] undisputed." *Magnolia Healthcare*, 2008 WL 95814, at *3. The patient's conservator "admitted in her response to [the nursing home's] motion to compel arbitration that [the patient] was mentally retarded and unable to care for herself or make her own decisions." *Id.* at *4. Finding no factual question concerning the patient's lack of capacity, the court found that the statutory requirements were met. *Id.*

There were two dissenting opinions in *Magnolia Healthcare* joined by a total of four judges. *Id.* at *4-6. (Graves, J., dissenting; Lamar, J., dissenting). In the second dissent, two judges distinguished the *Brown* case, cited by the majority, on the basis that the issue of the absence of a determination by the patient's primary physician, as opposed to her admitting physician, was not directly raised on appeal in that case. *Id.* at *7 (Lamar, J., dissenting). In *Magnolia Healthcare*, by

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[6] *See* Tex. Health & Safety Code Ann. § 313.004(a).

[7] The Texas rule allowed for the delegation of resident rights "when the physician has determined that, for medical reasons, the resident is incapable of understanding and exercising such rights." Tex. Admin. Code § 19.420.

[8] The Mississippi health care decisions statute required a determination of incapacity by "the primary physician." Miss. Code Ann. § 41-41-211 (Rev. 2005).

[9] Tennessee's Health Care Decisions Act is also a codification of the Uniform Health Care Decisions Act.

contrast, there was "no finding of any kind by any physician." *Id*. These judges characterized the majority as ignoring the plain language of the statute:

> By its crystal-clear language, the statute requires that "the patient has been determined by the primary physician to lack capacity." One would think that this threshold requirement would lead us to some cite in the record where [the patient] "has been determined by [her] primary physician to lack capacity." Not so. The record contains not one grain of evidence that [the patient's] primary physician made any such finding. In fact, the record in this case does not even disclose the identity of [the patient's] primary physician. This, of course, begs the question of why the majority would ignore such a clear statutory requirement.

Id.

The Tennessee Health Care Decisions Act affects a person's fundamental right to personal autonomy. *Cabany*, 2007 WL 3445550, at *5. In light of the important interests at stake, we have concluded that it is essential that the requirements of the Tennessee Health Care Decisions Act be met before a person can be deprived of the right to make his or her own health care decisions. The statutory requirements were not satisfied in this case.

In light of our decision that the trial court properly denied the defendants' motion to compel arbitration for failure to establish compliance with the Tennessee Health Care Decisions Act, we need not address the plaintiff's argument that Tenn. Code Ann. § 29-5-101 prohibits the enforcement of arbitration agreements against incompetents.

The decision of the trial court is affirmed. Costs of appeal are assessed against the appellants, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE